

**Choctaw Maid Farms, Inc. and Retail, Wholesale  
and Department Store Union, AFL-CIO. Cases  
15-CA-11462-3 and 15-CA-11551**

August 31, 1992

**DECISION AND ORDER**

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

On February 26, 1992, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a brief in support, and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Choctaw Maid Farms, Inc., Pelahatchie, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following at the end of paragraph 2(a). "with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

2. Substitute the attached notice for that of the administrative law judge.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Devaney, who dissented in *Solar Turbines*, 302 NLRB 14 (1991), does not agree with the general proposition for which it is cited by the judge here.

<sup>2</sup> The General Counsel excepts to the judge's failure to order the payment of interest as part of the make-whole remedy for the unlawfully withheld wage increase. We find merit to this exception and shall modify the recommended Order and notice accordingly.

**APPENDIX**

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform employees that annual wage raises are being withheld because employees have selected Retail, Wholesale and Department Store Union, AFL-CIO, or any other labor organization, to represent them.

WE WILL NOT withhold annual wage increases from employees at our Pelahatchie, Mississippi facility because they have chosen a union to represent them.

WE WILL NOT fail and refuse to reinstate economic strikers who abandon a strike and unconditionally offer to return to work before permanent replacements are hired and/or at a time when vacancies are available.

WE WILL NOT continue to hire replacement employees after strikers have made an unconditional offer to work, thereby discriminating against those strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL grant retroactively to employees at our Pelahatchie, Mississippi facility the annual wage increase due them in March 1991, plus interest.

WE WILL make whole Carolyn Stokes, Dorothy Taylor, Dorothy Ragsdale, Pamela Collier, and the as-yet-unidentified woman and other unreplaced strikers who were not reinstated on their unconditional offer to return to work, for any loss of earnings or other benefits they may have suffered by reason of our failure to reinstate them to the date they were reinstated, less net interim earnings, plus interest.

CHOCTAW MAID FARMS, INC.

M. Kathleen McKinney, Esq., for the General Counsel.  
Henry T. Arrington, Esq. and Bart N. Sisk, Esq. (*Kullman, Inman, Bee, Downing & Banta, P.C.*), of Memphis, Tennessee, for the Respondent.

## DECISION

## STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Jackson, Mississippi, on October 28 and 29, 1991. The charges which gave rise to this case were filed on March 22 and April 23, 1991, in Case 15-CA-11462 and on June 3 and July 18, 1991, in Case 15-CA-11551 by Retail, Wholesale and Department Store Union, AFL-CIO (the Union), against Choctaw Maid Farms, Inc. (Respondent). On May 3, 1991, a complaint and notice of hearing issued in Case 15-CA-11462-3. On July 29, 1991, an order consolidating cases and consolidated complaint issued in the above-captioned cases which alleges, *inter alia*, that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by stating to employees that their annual wage raise was being withheld because of their activities and sympathies on behalf of the Union, by withholding an annual wage increase because of those activities, and by failing and refusing to reinstate or rehire employees following a walkout despite their unconditional offer to return to work.

In its answer to the consolidated complaint, Respondent admitted certain allegations including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act; and the fact that employees engaged in a strike and later made an unconditional offer to return to work.

At the hearing, the complaint was amended to include an allegation that certain individual employees made unconditional offers to return to work on a date earlier than the other employees and an allegation that as Respondent was hiring replacements for the striking employees, it stated to prospective employees that any individual who had participated in the strike would not be allowed to apply for employment with Respondent. Respondent amended its answer to deny these additional allegations.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and introduce evidence. Following the close of the trial, counsel for General Counsel and Respondent both filed timely briefs which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

Choctaw Maid Farms, Inc. is, and has been at all times material herein, a Mississippi corporation which operates poultry processing and distribution plants at various locations in Mississippi. In the course and conduct of its business, Respondent annually sells and ships from its Mississippi facilities products valued in excess of \$50,000 directly to customers located outside the State of Mississippi.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. LABOR ORGANIZATION

Retail, Wholesale and Department Store Union, AFL-CIO is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates poultry processing and distribution plants at Carthage, Forest, Crystal Springs, and Pelahatchie, Mississippi. Only the Pelahatchie facility is involved in these proceedings.

On August 24, 1990, the Union filed a petition with the Board seeking to represent employees at the Pelahatchie facility. On October 19, an election was conducted in which the vote was 178 to 89 in favor of union representation. Respondent filed timely objections to the election which were overruled by the Regional Director for Region 15 on April 12, 1991. Respondent filed exceptions and the Board remanded the case to Region 15 for an evidentiary hearing on portions of the objections.

B. *The Failure to Grant an Annual Wage Increase*

Employee Margaret Seaberry testified that one day in early March 1991, Respondent CEO Paul Carter was walking through the facility with Plant Manager Jessie Prestage. Seaberry, who was with employee Mary Ann Walton, called Carter over and asked him when employees were going to get their annual raise. According to Seaberry, whom I credit, Carter responded, "The Union changed all that." As Carter started to walk away, Seaberry commented that she was looking for that raise. Carter answered that he needed a raise too.

Walton corroborates Seaberry that in response to Seaberry's question about a raise, Carter responded, "the Union had changed all that." Walton testified that after the exchange between Seaberry and Carter, Walton stated, "Yes, we are looking for a raise." Walton testified credibly that in response to her remark, Carter stated she would "have to go through the Union" for her raise. Carter was not called to testify, and Plant Manager Prestage could not specifically recall the conversation. I credit both Seaberry and Walton.

Employees Geneva McNair and Willie Cager testified concerning conversations they had with Supervisor Olan Sullivan in March regarding raises. McNair testified that in the first conversation, which occurred approximately March 11, 1991, she asked Sullivan when the employees were going to get a raise. A group of employees were present during this conversation, and nonsupervisory employee Cager spoke up and said the employees were not going to get a raise. McNair, however, repeated the question to Sullivan. McNair testified credibly that Sullivan laughed and said the employees were not going to get a raise because "you have everything tied up with the Union." Cager corroborates McNair, and I credit their testimony. Sullivan, who was called by Respondent, could not recall any particular conversation with any particular employee. Sullivan admitted, however, telling employees when asked that employees were not receiving a raise because "the Union and the plant had it tied up in court, and they were negotiating on what to do on this thing."

Cager testified to a second conversation with Sullivan which occurred approximately March 20. According to Cager, he called Sullivan over and said, "Olan, we aren't going to get a raise because of the Union, are we?" Cager testified credibly that Sullivan answered, "no," that the Union was in court over all this and the employees would have to wait until this blew over to see if they would get a raise. Although it presents a slightly different version, Sullivan's own testimony concerning his remarks to employees tends to strengthen rather than detract from Cager's testimony. I credit Cager.

With the exception of 1991, production employees at Respondent's Pelahatchie, Carthage, and Forest facilities have received annual pay raises each year since 1986. These raises have been awarded in March of each year, and the increases have been the same for employees at each of the three facilities. On March 25, 1991, employees at Forest and Carthage received an annual wage increase in the same amount as that given the previous year. Respondent admits that only the Pelahatchie employees did not receive the wage increase in 1991. Operations Manager Duffy McKenzie testified that the decision not to grant the increase at Pelahatchie was based solely on Respondent's "potential bargaining obligation" with the Union.

Employees Pamela Collier and Ilene Johnson testified that on April 3, 1991, they had a conversation with CEO Carter about employees not having received a raise. Collier testified she asked Carter why employees did not get a raise in March. Collier testified credibly Carter responded that he did not know, but that "as soon as we get this union thing over with, we will know from there." Johnson testified Carter also stated in response to Collier's question about raises, "we messed that up when we got the union in." While Collier did not testify to that remark by Carter, Carter was not called as a witness by Respondent to deny Johnson's testimony. The testimony of Collier and Johnson is in no way mutually exclusive. While Johnson's affidavit to the Board given 1 day after the event is also silent concerning the comment by Carter that employees had "messed up," Johnson's testimony and her statement given to the Board are also not mutually exclusive or inconsistent. Any doubts I may have had about Johnson's testimony at the time must also be balanced against the fact that Respondent did not call Carter as a witness to deny Johnson's testimony. Considering all of the above, I credit both Collier and Johnson, and I find that Carter made the remarks attributed to him by both Collier and Johnson.

#### *C. May 17: The Strike by Employees*

On Friday, May 17, 1991, at about 10 a.m., 56 of Respondent's employees in the evisceration and cut-up departments walked off the job. Testimony concerning conversations between employees reflects that the primary purpose of the walkout was to get supervisors and management to listen to employee concerns about heat, lack of fans, and long hours worked by employees. I credit the testimony of employee Katie Foster that as she was walking out, she informed Plant Manager Prestage that employees were walking out because of the working conditions and the long hours. According to Pamela Collier, Prestage also allegedly told the strikers as they left the premises, "If you walk out, don't come back." Plant Manager Prestage admitted that he was

in the hallway through which employees walked out, but he denied talking to any employees. Operations Manager McKenzie also testified that Respondent was not given any reason why the employees walked out.

I place no great significance on Prestage's alleged remark to strikers, "don't come back," nor on McKenzie's assertion that Respondent was given no reason for the walkout. Counsel for General Counsel does not allege Prestage's remark to violate the Act. Nor does counsel for General Counsel contend that Respondent took any action to terminate striking employees. On the other hand, in spite of McKenzie's testimony, Respondent does not deny that the walkout was motivated by working conditions and was an economic strike. Indeed, Respondent acknowledges that it was an economic strike, and treated employees as strikers when it hired permanent replacements. It is clear that regardless of the testimony on these points adduced by the parties, the walkout was in fact motivated by working conditions; Respondent was aware of this fact; and employees were economic strikers.

After walking out of the facility, employees went to the parking lot where they appointed Katie Foster as their spokesperson. The employees then decided to report back to work at their regularly scheduled time on Monday, May 20.

During the afternoon on May 17, Foster tried several times to telephone and speak to Plant Manager Prestage. Each time she called, Foster was able to speak only with the plant security guard who told Foster that Prestage was either out of the plant or unavailable.

#### *D. May 17: Respondent Begins to Hire Replacements*

Soon after employees left the plant, Operations Manager McKenzie instructed Personnel Manager Diane Watts and Director of Human Resources Ricky Rayborn to put together a list of the employees that had walked out. After consulting with counsel and concluding that employees who walked out could be permanently replaced, Respondent began the process of hiring replacement employees. Respondent began to telephone practically every individual who had an application on file. Respondent also asked current employees who had not walked out for names of individuals to contact about coming to work.

Personnel Manager Watts claimed that some people were hired on Friday, May 17. She further testified, however, that people contacted by telephone on Friday were instructed to attend a mass orientation on Saturday morning, May 18. According to Watts, people who were contacted by telephone on Friday but stated they would be unable to attend the orientation on Saturday were nevertheless told "they had a job" and were told that necessary paperwork would be completed when they reported to work on Monday morning at 6 a.m. I do not credit this portion of Watts' testimony for several reasons, including my observation of her as a witness. Further, this claim is altogether illogical and contrary to any sound business practice. Respondent was planning a mass hiring and orientation on Saturday morning, May 18. Since Respondent might well have all the employees it needed Saturday morning, there was no reason for Respondent to tell people on the telephone on Friday that they "had a job."

Personnel Assistant Richard Taylor testified credibly that he was told by Watts to begin telephoning individuals who had applications on file and to tell them that Respondent was hiring. Taylor was also instructed to tell individuals to come

to the plant Saturday morning, May 18, and if they knew anyone else who wanted to work, to inform them that Respondent was hiring. I conclude that on Friday afternoon, May 17, Respondent's focus was on getting the word to as many people as possible of the mass hiring and orientation meeting which was planned for the next morning. Further, I conclude that even if prospective employees were told by Respondent on Friday afternoon that they "had a job" if they could not attend the Saturday orientation meeting, such a statement by Respondent merely constituted an offer of work. It does not constitute proof of acceptance by the prospective employee which is necessary to establish that individual as a permanent replacement.

#### *E. May 18: Individual Offers to Return to Work*

At the trial herein, the parties stipulated that on May 18, striking employees Carolyn Stokes, Dorothy Taylor, and Dorothy Ragsdale came to the plant "to check on their job status."<sup>1</sup>

Personnel Assistant Taylor testified that on Saturday morning, May 18, between 7:30 and 8 a.m., employees Pamela Collier, Dorothy Taylor, and Dorothy Ragsdale came into the personnel office, stated they wanted to check on their jobs, and asked Taylor if they still had jobs. Taylor testified with certainty that these individuals came in and spoke to him before Taylor went into the breakroom with applications for prospective employees waiting to be hired as permanent replacements. Collier testified consistently with Taylor that she and Ragsdale went to the facility about 7 a.m. Collier testified somewhat more specifically than Taylor that she told Taylor she was there to see about getting her job back. I credit Collier. I also credit Collier that Richard Taylor stated in response that they would have come back on Monday.

Personnel Assistant Taylor also testified that while Respondent was still getting the paperwork ready for prospective employees, a man and his daughter came into the personnel office. The man requested his daughter's job back. Taylor testified credibly that in response to this, Personnel Manager Watts told the man and his daughter that the people who walked out on Friday would have to wait until Monday.

Personnel Manager Watts admitted that a group of three employees, including Dorothy Ragsdale, came to the plant Saturday to check on their jobs. Watts testified she spoke with the group and told them that they had been permanently replaced. According to Watts this conversation occurred after the mass orientation session on Saturday morning. I do not credit Watts concerning the timing of this conversation. Collier testified credibly that she went to the plant at about 7 a.m., Saturday morning. Personnel Assistant Taylor places the time of the three employees' arrival at about 7:30 or 8 a.m., but in any event prior to the meeting where mass hiring and orientation took place. I credit the mutually consistent testimony of Collier and Taylor.

There are no magic words necessary to be used by a striking employee who chooses to abandon the strike and offers to return to work. The credible testimony of employee Collier makes it clear that she asked about getting her job back. Since Personnel Assistant Taylor or Personnel Manager Watts, or both, told employees that they would have to come

back on Monday, there was no particular reason for other individuals with them to go through the formality of notifying Respondent they wished to return to work. It was clear by their actions, both individually and as a group, that employees who returned to the plant Saturday morning wanted to return to work. By so doing, they had effectively communicated to Respondent that they were abandoning any strike and unconditionally offering to return. I so find.

Employee spokesperson Katie Foster testified that between 8 and 9 a.m., on Saturday, May 18, she too went to the plant because she had been unable to reach Plant Manager Prestage by telephone. When she arrived, Foster asked the security guard if she could speak with Prestage. The guard told Foster that he did not believe Prestage was available and that Prestage was "real tied up hiring new people." Foster saw Personnel Assistant Taylor coming from the breakroom, and spoke with him. Foster asked Taylor what was going on. Taylor told Foster that Prestage was busy. Foster asked what employees were suppose to do about reporting to work on Monday. Taylor responded that he knew they were supposed to report back to work on Monday, but that he had not heard anything else specifically. Foster left without getting to speak to Prestage.

#### *F. May 18: Mass Hiring of Replacements and Orientation*

Personnel Manager Watts testified that on Saturday morning May 18, beginning at 8 a.m., she conducted a meeting with people during which they were hired en masse. An orientation session followed. Witnesses presented by both counsel for General Counsel and Respondent testified that the meeting began by Watts announcing to the assembled group that everyone "was hired." Respondent then distributed applications, tax forms, and other personnel documents which it had the individuals complete. The record reflects that 82 individuals were hired Saturday morning and participated in the mass orientation. Each of them was compensated for 1 hour. Counsel for General Counsel does not dispute the fact that during this meeting, the newly hired employees were assured that they had "permanent jobs." Finally, the group was told to report for work Monday morning between 6:15 and 6:30 a.m., so Respondent could "place" the employees in particular jobs.

Counsel for General Counsel offered the testimony of Regina Guy, an applicant who was hired during the meeting on Saturday morning, who testified that after Watts began the meeting by telling everyone present that they were hired, Director of Human Resources Rayborn then told the assembled group that he was going to read a list of names and anyone whose name was on the list would have to leave or be escorted out by police. Guy testified that one or two individuals got up and left when Rayborn read from the list of names. Guy admitted that she did not know the names of these individuals who got up and left.

Rayborn was not called by Respondent to deny Guy's testimony. I have no doubt that Rayborn made the statements attributed to him by Guy. Her testimony is effectively corroborated by Personnel Assistant Taylor and Helen Ragsdale. I have considerable doubt, however, about whether any employees who walked out on Friday were present in the meeting and left as a result of remarks by Rayborn. Regina Guy testified Rayborn read from this list but could not recall any

<sup>1</sup> As a result of the stipulation, none of these individuals were called to testify.

of the names he read and did not know anyone who left. Personnel Assistant Taylor testified Rayborn read from a list of names, but did not indicate whether anyone left after Rayborn read from the list. Helen Ragsdale specifically testified that no one left after Rayborn read from the list. Respondent is correct that the identity of the 56 strikers has never been in dispute. Yet counsel for General Counsel did not call any of the 56 to testify that they were present and left the breakroom on Saturday morning as a result of anything said by Rayborn. It would not have been particularly difficult for counsel for General Counsel to locate such employees if they existed. Counsel for General Counsel, however, offered no witness who was affected by this remark.

#### *G. May 20: Employees Offer to Return En Masse*

Employees from the evisceration department who walked out normally started work at 6 a.m., whereas employees in the cut-up department normally started at 7 a.m. Employee Spokesperson Foster testified that she arrived at Respondent's facility at about 5:50 a.m. on Monday morning, May 20. Between 5:55 and 6 a.m., a group of employees approached the guard shack. The guard told the employees that they were not welcome on the property and that they had been fired.<sup>2</sup> Director of Human Resources Rayborn then came out and met the employees, informed them that they had been permanently replaced, and wrote down the name of everyone that was in the group.

Employees who normally reported for work at 7 a.m. began to arrive and assemble at the plant between 6:45 and 6:50 a.m. It appears the entire group then approached the guard shack once again. Rayborn again came out and made a list of the people present. CEO Carter, Operations Manager McKenzie, and Plant Manager Prestage all came out, met with the returning employees, and answered their questions. Employees were informed of their recall rights. There is really no question, and indeed Respondent admits, that the employees who walked out on Friday, May 17, all made an unconditional offer to return to work on Monday morning May 20. Indeed, a list was created by Respondent noting the name of each returning striker and the time when they "surrendered" to Respondent.

#### *H. May 20: Hiring of Additional Employees by Respondent*

In its posttrial brief, Respondent admits, "It is undisputed that the company continued to take applications through Monday, May 20, 1991." During her testimony, Personnel Manager Watts was asked whether any people were hired on Monday, May 20. Watts answered that Respondent did "paperwork on some people Monday." Watts continued:

We had had several people that had called and that we had called on Saturday and Friday to—that we were going to hire and they said that they couldn't come on Monday morning. . . . We promised them a job, but we didn't actually do their paperwork. . . . They started to work. We started them at 6 a.m. on Monday.

According to Watts, everyone Respondent hired had been offered jobs prior to 6 a.m. Monday. I have no doubt whatever that Watts' testimony was fabricated to be consistent with Respondent's position in this proceeding. For reasons which will become clear below, I find Watts wholly incredible on this point.

Personnel Assistant Taylor testified that on the morning of May 20, Personnel Manager Watts told him Respondent needed to hire some more people in order to avoid having to go to the walkout list to make sure Respondent had enough employees to work that day. Taylor testified credibly that although Respondent hired a number of people long after 6 a.m. on May 20, Personnel Manager Watts told Taylor to put 6 a.m. on these new employees' timecards as the time that they started work. Taylor testified that Respondent hired Maranda Donald, Adrian Nelson, Karen Stubbs, Patricia Holloway, Bruce Walker, Judy McLemore, Wanza (Janzia) Watson, and "a number of people" after 6 a.m., Monday. While Taylor's testimony is not completely accurate as to every individual, in many cases his testimony is accurate and is corroborated by the individuals themselves, as more fully discussed below. According to Taylor, it was around 10:30 a.m. when Watts finally decided that Respondent "had enough people to replace the walkouts and didn't need to hire anymore."

Respondent argues that Taylor should be discredited since he had an axe to grind with Respondent as a result of being discharged. No doubt Taylor felt animosity toward Respondent for being discharged, but for the most part Taylor exhibited that animosity by telling the truth about Respondent's hiring practices on the morning of May 20. As with most witnesses, Taylor's testimony is to some extent inaccurate. Taylor identified Gloria McNair and Bruce Walker as individuals hired on May 20. McNair and Walker actually attended the mass orientation meeting on Saturday, May 18, filed applications, and were compensated for attending that meeting. The testimony of several employee witnesses, however, considered both individually and collectively, leaves no room for doubt about the fact that Respondent decided to hire additional employees on Monday morning, May 20, to make sure there would be no room for people who walked off the job on Friday, and that Respondent hired these new employees after the strikers' unconditional offer to return to work.

Adrian Nelson testified that she heard on Friday, May 17, Respondent was hiring. Nelson had not previously applied with Respondent. On Monday morning, while on her way to work for another employer, Nelson decided to go to Respondent's facility and put in an application. Nelson testified that she had not spoken with anyone at Respondent prior to that Monday. According to Nelson, she arrived at the plant about 5:45 a.m. and went first to the security guard, who she asked if Respondent was hiring. The guard told Nelson "yes," and told her where to park. Nelson also testified that she saw Katie Foster, Della Fletcher, and Charlene Hollis,

<sup>2</sup>Testimony reflects that on two or three occasions that morning, employees who had walked out on Friday were told they had been "fired." It is clear, however, that none of the employees were fired or terminated. It is also clear that the assembled group was notified by management officials that they had actually been "permanently replaced" and that they had certain recall rights. Counsel for General Counsel specifically represented that no finding is sought concerning remarks to employees that they had been "fired" and no finding is made.

among others, all of whom had walked out on Friday, already standing on the premises when she arrived. Nelson went to the breakroom where she saw other individuals looking for jobs, including Patricia Holloway, Sandra Johnson, Jackie Agee, and Karen Stubbs.

Between 8 and 8:30 a.m., Nelson left Respondent's facility to go home and tell her mother where she could be located. Nelson testified credibly that at the time she left the facility, no one from the personnel department had spoken with Nelson, and no one had offered or promised her a job. Nelson returned to the facility at about 8:35 a.m. She went back to the breakroom and waited. Nelson was finally taken into the personnel office at around 10:30 to 11 a.m.<sup>3</sup> Nelson testified credibly that she was the last person taken into the personnel office and hired that morning. According to Nelson, about 20 people were taken into the personnel office before her that morning including Karen Stubbs, Patricia Holloway, Wanza (Janzia) Watson, Jackie Agee, Lindsey Wilson, and Rhonda Moore. Nelson's testimony thus tends to corroborate that of Personnel Assistant Taylor, while it too is corroborated both by testimony and by documentary evidence. For example, the applications of Patricia Holloway and Karen Stubbs are both dated Monday, May 20. Thus, Personnel Assistant Taylor and Adrian Nelson both identified Holloway as someone who was hired on Monday, May 20. Not only is Holloway's application dated Monday, May 20, but she herself testified that she was not hired until sometime after 11 a.m.

Patricia Holloway testified that she went to Respondent's facility on Saturday, May 18, after being told by her sister that Respondent was hiring. Holloway arrived at the facility at about 10 a.m. and asked if Respondent was still hiring. Holloway testified credibly that she was told Respondent was still hiring but that she should come back Monday, May 20. Holloway also testified credibly that while at the facility on Saturday, no one offered her a job or told her she had a job. Holloway returned to Respondent's facility on Monday, May 20, about 7 a.m., and was told to wait in the breakroom. Holloway filled out an application for the first time that morning along with Renee Busby.<sup>4</sup> Holloway testified that she was not hired until sometime between 11 a.m. and 12 noon. Although Adrian Nelson and Holloway were both hired much later in the morning, both were paid as having

started work at 6 a.m., on May 20. Their timecards were simply handwritten as having started at that time, as Personnel Assistant Taylor testified he was told to do with several individuals.

In conclusion, based on the composite testimony of Personnel Assistant Taylor, Adrian Nelson, Patricia Holloway, and other employee witnesses including Regina Guy and Helen Ragsdale, I find that on Monday morning, May 20, Respondent hired at least 11 new employees after striking employees had made an unconditional offer to return to work. These 11 are Judy Renee McLemore/Busby, Wanza (Janzia) Watson, Adrian Nelson, Sandra Johnson, Patricia Holloway, Jackie Agee, Karen Stubbs, Lindsey Wilson, Rhonda Moore, Maranda Donald, and Willie Chambers.<sup>5</sup>

#### *I. June 13 to Mid-August: Reinstatement of Strikers*

Using the "surrender list" produced by Rayborn on Monday, May 20, Personnel Manager Watts prepared a separate folder for each of the strikers which she numbered from 1 to 56 based on the order in which they "surrendered." The first employees on the list were the employees who reported to the facility on Saturday, May 18, to inquire about their jobs.<sup>6</sup>

Beginning on June 13, 1991, strikers were offered reinstatement. There is no dispute about the fact that Respondent went through the list of strikers in numerical order and began calling them, as vacancies occurred, to see if they would return to work. If Respondent was unable to reach a particular striker, that person was temporarily bypassed and Respondent continued through the list. Notations were made as to when the striker was called and what response, if any, was given.

On August 12, Respondent mailed a letter to all remaining strikers informing them that positions were available in the cut-up department and that they should contact Respondent on August 19 about returning to work.

All strikers who wished to return to work were reinstated by the end of August.<sup>7</sup>

<sup>5</sup>The applications of McLemore, Watson, Nelson, Holloway, Stubbs, Donald, and Chambers are all dated May 20. Further, all of their timecards were handwritten with starting times as 6 a.m. May 20 rather than machine stamped, as Personnel Assistant Taylor testified he was told to do so.

<sup>6</sup>Respondent's own treatment of these individuals in this manner tends to reinforce the conclusion that Respondent knew these individuals were making an unconditional offer to return on that Saturday morning.

<sup>7</sup>One witness, Margaret Seaberry, was called by counsel for General Counsel and testified that she had not been contacted about returning to work. Seaberry's reinstatement folder, however, contains a note which reads:

Margaret called today—7-9-91. Does not plan or want to come back to work—is working at McCarthy Farms.

I find that Respondent acted lawfully in not contacting Seaberry after having been advised that she had accepted employment elsewhere.

Two strikers, Anita Davis and Mary Ann Walton offered testimony the essence of which was that when they were recalled to work, they were not returned to their former positions although the former positions were either available at the time or later became available. I note, however, that the complaint contains no allegation that employees were not properly reinstated to their former positions. The record also reflects that at least in the case of Walton, she was transferred back to her former position even before the trial herein.

<sup>3</sup>Operations Manager McKenzie testified that at some point during the morning of May 20, he spoke with Supervisor Shirley Norwood in the breakroom concerning Adrian Nelson. According to McKenzie, Norwood told him that Nelson had worked for the Company before and had been a good employee. McKenzie claims he then approached this individual, whom he believes to have been Nelson, and told the individual that Respondent had a job for her. McKenzie claims this conversation occurred before the strikers returned. I am not at all convinced that this conversation ever occurred as described by McKenzie. Whether it did or not, however, I credit Nelson that when she left the facility for a time between 8 and 8:30 a.m. that morning, no one had offered or promised her a job. The record is clear that by that time, the strikers had made an unconditional offer to return to work.

<sup>4</sup>It appears that Judy Renee, Renee Busby, and Judy Renee McLemore are all the same person. Personnel Assistant Taylor identified Judy McLemore as one of the individuals hired on Monday, May 20. Holloway identified Renee Busby. McLemore's application dated May 20 reflects the first name Judy Renee, and lists as the person to contact in case of emergency as her mother, Judy Busby. Accordingly, I find that all of these names apply to the same person.

### Analysis and Conclusions

In October 1990, employees at Respondent's Pelahatchie facility voted two-to-one in favor of union representation. As Respondent's objections to the election were pending before the Board, the time for employees to receive an annual wage increase in March or April began to approach. Throughout March, various employees asked supervisors and management officials whether they would get the annual wage increase. Respondent CEO Paul Carter told employees, "The Union changed all that" and that employees would "have to go through the Union" for their raises. Supervisor Olan Sullivan told employees they were not going to get the annual raise because "You have everything tied up with the Union" and because "The Union and the plant had it tied up in court, and they were negotiating on what to do on this thing." Sullivan also told employees they would not get the raise because the Union was in court over it and employees would have to wait until the issue "blew over" to see if they would get a raise.

Respondent admits it withheld a wage increase from employees at the Pelahatchie facility solely because of its "potential bargaining obligation" with the Union. The record is clear that production employees at Pelahatchie, as well as the Carthage and Forest facilities, have received annual pay raises every year since 1986. The increases have been the same for employees at each of the three facilities. On March 25, 1991, employees at Forest and Carthage received an annual wage increase in same amount as that given the previous year. Only the Pelahatchie employees did not receive the wage increase in 1991.

In early April, CEO Carter was again asked about the raise by employees. Carter informed employees that "as soon as we get this union thing over with, we will know from there." Referring to raises, Carter also told employees they "messed that up when we got the Union in."

Regarding the raise, Respondent argues in its posttrial brief:

The company made the decision not to grant the increase in March because it recognized that if its objections were dismissed, the company would have a bargaining obligation *retroactive* to the date of election on terms and conditions of employment for employees at the Pelahatchie facility. Thus, any unilateral change in the terms and conditions of employment (including a pay increase) for the Pelahatchie employees *prior* to the final resolution of the objections would have been an unfair labor practice.

Board law in this area, however, is quite clear. As the Board stated in *Baker Brush Co.*, 233 NLRB 561, 562 (1977):

[T]he annual granting of similar wage increases had been a customary practice of Respondent through the years and, as such, was clearly a condition of employment. . . . Accordingly, Respondent would not have been legally restrained from granting the promised in-

crease if the union had been certified, but rather would have had a legal obligation to pay it. . . . The Board, with Court approval, has consistently held that an employer who withholds pay raises from employees who have chosen a union as their bargaining representative violates the Act if the employees otherwise would have been granted the raises in the normal course of the employer's business. *Florida Steel Corp.*, 220 NLRB 1201 (1975), *enfd.* 538 F.2d 324 (4th Cir. 1976).

As acknowledged by Respondent, it was Respondent's practice to grant annual pay raises to employees at Pelahatchie, Carthage, and Forest. The increases have even been for the same amount at each of three facilities. I find that, as such, these annual wage increases had become a condition of employment. Employees at Forest and Carthage received the annual wage increase in 1991, while only the employees at Pelahatchie, who had voted to be represented by the Union, had the raise withheld from them. It is quite clear, and in fact Respondent effectively admits, that employees at Pelahatchie would have been granted the raise in the normal course of the Employer's business in 1991 had they not chosen the Union to represent them. There is simply no merit whatever to Respondent's claim that it would have been guilty of a unilateral change by granting this established wage increase. Moreover, it is clear that Respondent used the opportunity of withholding the raise to blame this on the Union. Referring to annual raises, CEO Carter told employees that "The Union changed all that" and employees "messed that up" when they elected the Union. I find that Respondent's statements to employees concerning its failure to grant an annual wage increase, as well as Respondent's withholding of the wage increase itself, violate Section 8(a)(1) of the Act.

On Friday, May 17, 1991, 56 employees in the evisceration and cut-up departments at Pelahatchie walked off the job to protest working conditions. As such, these employees were economic strikers subject to being permanently replaced, but with reinstatement rights clearly defined by Board precedent.

After consulting with counsel and concluding that employees who walked out could be permanently replaced, Respondent began the process of hiring replacement employees. On Friday afternoon, May 17, Respondent attempted to contact as many people as possible to inform them of a mass hiring and orientation meeting planned for the next morning. I do not credit Respondent's claim that prospective replacements were promised jobs on Friday, May 17. Moreover, I find that even if certain prospective employees were told by Respondent on Friday afternoon that they "had a job," such a statement by Respondent merely constituted an offer of work. In order for a prospective employee to be considered a permanent replacement, the putative replacement must first accept the employer's offer of permanent employment. *Solar Turbines*, 302 NLRB 14 (1991). The burden of proof is clearly on the employer to establish the hiring of a permanent replacement. *Associated Grocers*, 253 NLRB 31 (1980), and cases cited therein. Respondent's offer of work to prospective employees does not constitute proof of acceptance by the prospective employee which is necessary to establish that individual as a permanent replacement.

I find these incidents isolated, and inasmuch as the complaint contains no allegation concerning Respondent not properly reinstating strikers to their former positions, I shall make no such finding.

On Saturday morning, May 18, striking employees Carolyn Stokes, Dorothy Taylor, Dorothy Ragsdale, and Pamela Collier, as well as one unidentified woman who came with her father, came to Respondent's plant to inquire about returning to work. I find that these employees came to Respondent's facility prior to the meeting where mass hiring and orientation took place. By their actions, both individually and as a group, employees who returned to the plant Saturday morning effectively communicated to Respondent that they were abandoning the strike and unconditionally offering to return to work. I so find. Since these individuals abandoned the strike and offered to return to work at a time when there were clearly vacancies available, I find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate those employees.<sup>8</sup> I do not find that Employee spokesperson Katie Foster's return to the plant on Saturday morning constituted abandonment of the strike and an offer to return by all striking employees. Foster never spoke to Plant Manager Prestage, and there is no indication that in her conversation with Personnel Assistant Taylor she made an offer on behalf of all striking employees to return to work. It is entirely possible that in going to the plant on Saturday morning, Foster may have been going to discuss working conditions which lead employees to walk out. Accordingly, I find the record is not sufficient to support a finding that Foster made an unconditional offer to abandon the strike and return to work on behalf of all striking employees.

On Saturday morning, May 18, Respondent conducted a meeting during which replacements were hired en masse and an orientation session was conducted. Eighty-two permanent replacements were hired Saturday morning. During that meeting, Director of Human Resources Ricky Rayborn told the assembled group at one point that he was going to read a list of names, and anyone whose name was on the list would have to leave or be escorted out by police. The record evidence is not sufficient, however, to support a finding that anyone was adversely affected by this remark. Counsel for General Counsel amended the complaint at the trial herein to allege that by Rayborn's remark, Respondent stated to prospective employees that any individual who had participated in the strike would not be allowed to apply for employment with Respondent. I cannot agree with counsel for General Counsel that this was the effect of Rayborn's remark. Nor do I believe that prospective strike replacements would necessarily or even reasonably interpret Rayborn's remark in the same way that counsel for General Counsel does. Rayborn never said that strikers would not be rehired by Respondent. What Rayborn did say was clear and simple, that if certain individuals were present whose names appeared on the list which he was going to read, they would have to leave the premises. What reasonable interpretation prospective employees might have given to that is sufficiently ambiguous that no finding of a violation is warranted. I shall dismiss that allegation from the complaint.

Employees who walked out on Friday, May 17, and who had not already done so, make an unconditional offer to return to work on Monday morning, May 20. Although Respondent had already hired more permanent replacements

than the number of employees who had walked out, Respondent decided to hire additional employees to make sure there would be no room for people who walked off the job on Friday. On Monday morning, May 20, Respondent hired 11 new employees after striking employees made an unconditional offer to return to work. Eleven striking employees were thereby discriminated against by not being offered available positions on Monday, May 20. I find that by hiring additional employees on Monday morning, May 20, rather than reinstating strikers who had made an unconditional offer to return to work, Respondent discriminated against employees in violation of Section 8(a)(1) and (3) of the Act.

I agree with Respondent that at the trial herein and in its posttrial brief, counsel for General Counsel seems to imply that Respondent had to hire the exact number of permanent replacements as the number of strikers, and that Respondent must be able to designate which permanent replacement replaced which striker. Counsel for General Counsel apparently argues that because Respondent hired more replacements than there were strikers and because Respondent is unable to designate a particular replacement as having replaced a particular striker, the replacements were not true permanent replacements. In her posttrial brief, counsel for General Counsel argues:

Respondent's sole purpose has not been to keep its business running. The Respondent discriminatorily and with animus, hired almost twice as many individuals as walked out with the stated purpose of not recalling the walkouts.

Counsel for General Counsel argues it should be found that "Respondent unlawfully hired all of the replacements." I am not persuaded by this argument for several reasons. If striking employees are economic strikers, the law allows an employer to hire permanent replacements. What its state of mind might be in exercising that right is irrelevant. Counsel for General Counsel's argument is also rejected because it fails to take into consideration the practical problem that an employer may face in attempting to operate without experienced employees. Poultry processing is not particularly skilled work. Employees perform various functions, and their individual productivity is determined largely on the basis of being able to perform certain maneuvers quickly. I credit the testimony of Operations Manager McKenzie that "55 experienced employees could probably do the work of 100 unexperienced [sic] employees." I agree with Respondent that more replacements might be necessary to perform the same volume as the number of employees who went on strike. I find nothing unlawful by Respondent hiring more replacements than there were employees on strike, except to the extent that Respondent continued to hire replacements after strikers made their unconditional offer to return to work.

#### CONCLUSIONS OF LAW

1. Respondent Choctaw Maid Farms, Inc. is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail, Wholesale, and Department Store Union, AFL-CIO is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

<sup>8</sup>I defer to the compliance stage of this proceeding whether the yet-unidentified woman who returned with her father can be identified.

3. Respondent informed employees that their annual wage raise was being withheld because they had selected the Union to represent them; and Respondent thereby violated Section 8(a)(1) of the Act.

4. Respondent withheld an annual wage increase from employees at its Pelahatchie, Mississippi facility because employees had chosen the Union to represent them; and Respondent thereby violated Section 8(a)(1) of the Act.

5. Employees at Respondent's Pelahatchie, Mississippi facility in the evisceration and cut-up departments walked off the job to protest working conditions, and, as such, were economic strikers.

6. Employees Carolyn Stokes, Dorothy Taylor, Dorothy Ragsdale, Pamela Collier, and one as-yet-unidentified woman abandoned the strike and unconditionally offered to return to work before permanent replacements had been hired and at a time when vacancies were available. By refusing to reinstate those employees, Respondent violated Section 8(a)(1) and (3) of the Act.

7. Respondent continued to hire replacement employees after the strikers' unconditional offer to return to work, and for each additional new employee hired, Respondent discriminated against such strikers, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

8. By hiring more replacement employees than the number of individuals who went on strike as a result of business necessity, Respondent did not discriminate against strikers and did not violate the Act. Accordingly, that allegation is dismissed.

9. The unfair labor practices, which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, Choctaw Maid Farms, Inc., Pelahatchie, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that annual wage raises are being withheld because employees have selected Retail, Wholesale and Department Store Union, AFL-CIO, or any other labor organization, to represent them.

<sup>9</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Withholding annual wage increases from employees at its Pelahatchie, Mississippi facility because they have chosen a union to represent them.

(c) Failing and refusing to reinstate economic strikers who abandon a strike and unconditionally offer to return to work before permanent replacements are hired and/or at a time when vacancies are available.

(d) Continuing to hire replacement employees after strikers have made an unconditional offer to return to work, thereby discriminating against such strikers.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant retroactively to its employees at its Pelahatchie, Mississippi facility the annual wage increase due them in March 1991.

(b) Make whole employees Carolyn Stokes, Dorothy Taylor, Dorothy Ragsdale, Pamela Collier, and the as-yet-unidentified woman who abandoned the strike and unconditionally offered to return to work before permanent replacements had been hired and at a time when vacancies were available, as well as those employees who were discriminated against by Respondent continuing to hire replacement employees after the strikers' unconditional offer to return to work, for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them by paying a sum of money equal to the amount they normally would have earned from the date of the discrimination to the date when they were in fact reinstated by Respondent, less net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>10</sup>

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of the this Order.

(d) Post at its Pelahatchie, Mississippi facility copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>10</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>11</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."